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The Principles of Interpretation Applied by the Court of Justice of the European Communities and Their Relevance for the Scope of the EEC Competition Rules

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Abstract

This Article looks at various aspects in how EEC competition rules have been interpreted by courts. In Part I, I will review some of the more recent examples of cases in different areas of Community law in which the Court has safeguarded the comprehensive character of the Community legal order by means of the teleological method of interpretation. Not surprisingly, the same judicial concern governs the Court's interpretation of Article 85, 86, and 90 of the Treaty. In Part II, after noting a number of past examples of this coherence in the competition cases, I will also try to show that in recent competition cases balanced comprehensiveness of the system of undistorted competition continues to guide the Court's decisions.

THE PRINCIPLES OF INTERPRETATION APPLIED BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES AND THEIR RELEVANCE FOR THE SCOPE OF THE EEC COMPETITION RULES*

*Bastiaan van der Esch***

INTRODUCTION

The abundant literature concerning European Community ("EEC") competition law rarely looks beyond the borders of its subject. Thus, the link with legal developments in other areas of Community law is slowly withering if not entirely lost. This blinkered approach is detrimental to a proper understanding of the European Court of Justice's judgments in competition cases. This Article is an attempt to re-awaken the interest of antitrust lawyers in Community law in general. The Court of Justice's principles of interpretation are a natural subject for an attempt to widen the focus through which antitrust problems are perceived.

The most recent systematic analysis of the Court's methods of interpretation stems from Baron J. Mertens de Wilmars, a former President of the Court.¹ He demonstrates that the Court uses all the traditional tools of judicial interpretation and that only the mix in which the various methods are relied upon reflects the special nature of the Community. Examples abound in the Court's case law of literal and grammatical interpretation, as well as of the historical, systematical or teleological methods of interpretation. Mr. Mertens attributes the greater emphasis in Community law of the teleological method to the special nature of the Community as a framework for the

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1. See J. Mertens de Wilmars, *Réflexions sur les Méthodes d'Interprétation de la Cour de Justice des Communautés Européennes*, 1986 *C. DE D. EUR.* 5; see also *De grondslagen van het recht van de Europese Gemeenschappen, R en R*, 1986 *NEDERLANDS TIJDSCHRIFT VOOR RECHTSFILOSOFIE EN RECHTSTHEORIE* 28.

achievement of economic unity, a purpose that is both specific, comprehensive and evolutionary.²

One of the obligations of results contained in the Treaty Establishing the European Economic Community (the "EEC Treaty" or "Treaty")³ is the Court's own role. By virtue of Article 164 of the Treaty, the Court must ensure that the objectives of the European Communities' treaties are achieved in accordance with the rule of law.⁴ Hence the Court's insistence on the autonomy and comprehensiveness of a Community legal order in which there is no place for what Mr. Mertens calls "silent" or "speechless" judges. If the treaties or secondary legislation do not contain a reply to a given legal question, the fundamental objectives of the Community, in combination with general principles of law, must be relied on to provide an answer. This necessity explains the considerable role played by the teleological method of interpretation.

With such an authoritative statement on the subject at our disposal, it is not my intention to cover the same ground once more. My more modest aim is twofold. In Part I, I will review some of the more recent examples of cases in different areas of Community law in which the Court has safeguarded the comprehensive character of the Community legal order by means of the teleological method of interpretation. Not surprisingly, the same judicial concern governs the Court's interpretation of Articles 85, 86, and 90 of the Treaty. In Part II, after noting a number of past examples of this coherence in the competition cases, I will also try to show that in recent competition cases balanced comprehensiveness of the system of undistorted competition continues to guide the Court's decisions.

1. THE USEFUL EFFECT PRINCIPLE AS THE MAIN EXPRESSION OF THE TELEOLOGICAL METHOD OF INTERPRETATION

With the help of the useful effect principle, the Court identifies that interpretation of a text which contributes most

2. Mertens, *supra* note 1, at 16-19.

3. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

4. *Id.* art. 164. Article 164 provides that "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." *Id.*

adequately to the achievement of the objective embodied in the rule of Community law under examination. This principle is a short form of a broader rendition of the same interpretative method contained in one of the earlier judgments of the Court. In *Fédération Charbonnière de Belgique v. High Authority of the ECSC* ("Fedechar")⁵ the Court based an interpretation of the Treaty Establishing the European Coal and Steel Community (the "ECSC Treaty")⁶ on the generally accepted rule of interpretation "according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied."⁷

New references to this useful effect principle occur regularly in the case law. The Court uses it mainly to define important duties of Member States, such as the protection of Community citizens' rights. Occasionally, the principle also serves to solve uncertainties that are apparently of minor importance, although they nearly always touch on the overall effectiveness of Community law.

A. Recent Examples of the Useful Effect Principle

The following are among the more interesting recent examples:

(1) Article 37 of the Treaty Establishing the European Atomic Energy Community (the "Euratom Treaty")⁸ institutes a consultation procedure concerning radioactive effluents liable to contaminate the soil, water or air in other Member States. In *Saarland v. Minister of Industry, Post & Telecommunications & Tourism*,⁹ France argued that it had complied with this provision by starting consultations just prior to the first discharge of radioactive effluents. The Court rejected the argument and ruled that the consultation procedure had to be started before the Member State concerned authorized any

5. Case 8/55, [1956] E.C.R. 245.

6. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (1957) [hereinafter ECSC Treaty].

7. *Fedechar*, [1956] E.C.R. at 299 (emphasis added).

8. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, art. 37, 298 U.N.T.S. 167 (1958).

9. Case 187/87, [1988] E.C.R. 5013, [1989] 1 C.M.L.R. 529.

discharge of this kind.¹⁰ Only that interpretation of Article 37 of the Euratom Treaty protects the useful effect of the provision.

(2) When Italy argued that foreign touring guides accompanying foreign groups in Italy had to comply with the same professional qualifications as Italian guides, the Court, confirming an earlier judgment,¹¹ said that the freedom to provide services granted by Article 59 of the Treaty would be deprived of useful effect if Member States could subject its exercise to requirements identical to those governing establishment.¹²

(3) Similarly, a narrow construction of Article 48 of the Treaty¹³ was rejected in *Regina v. Immigration Appeal Tribunal, ex parte Antonissen*,¹⁴ when the United Kingdom argued that workers in search of a job could be deprived of their right of free movement granted by the Treaty if after six months they had not found a job. The Court took the view that too strict an interpretation of Article 48(3)(c) of the Treaty, which grants the right of sojourn for the purpose of filling a job, would jeopardize the useful effect of Article 48(3) as a whole, including sections (a) and (b), which give workers the right to search for vacancies wherever they occur in the Common Market.¹⁵

(4) Not so long ago, yet another aspect of the comprehensive character of the Community legal order was at stake before the House of Lords. It is a common law rule that U.K. judges cannot grant measures of interim protection against the Crown. The question arose whether that rule also applied when persons invoked Treaty rights against a U.K. law affecting those rights. The Court answered in the negative, not only because the primacy of Community law over contrary national law would otherwise be jeopardized, but also because the useful effect of Article 177 of the Treaty¹⁶ would be diminished if a national judge, who suspends a case until the Court of Justice

10. *Id.* at 5042, [1989] 1 C.M.L.R. at 542.

11. *SA Transporoute et Travaux v. Minister of Pub. Works*, Case 76/81, [1982] E.C.R. 417, [1982] 3 C.M.L.R. 382.

12. *Commission v. Italy*, Case C-180/89 (Eur. Ct. J. Feb. 26, 1991) (not yet reported).

13. EEC Treaty, *supra* note 3, art. 48.

14. Case C-292/89, [1991] E.C.R. ___, [1991] 2 C.M.L.R. 373.

15. *Id.* at ___, [1991] 2 C.M.L.R. at 398.

16. EEC Treaty, *supra* note 3, art. 177.

has answered his question, could not take interim measures.¹⁷ In this manner, Community law resolutely stepped into a gap in U.K. law caused by a misguided idea of the sovereignty of Parliament.

(5) The complexity of the interface between Community and national law unfolded further in preliminary questions from courts in Germany. At stake were levies imposed by the German authorities on German sugar producers on the basis of a Community regulation. In interim proceedings, the producers requested the suspension of national decisions implementing the Community regulation. The German courts wanted to know whether they were empowered to do so. The Court ruled that the system of legal protection in the Community necessarily implied the right of Community legal subjects to contest the legality of Community law when national authorities act to administratively implement that law, and that the useful effect of Article 177 would be jeopardized if suspension of the national administrative acts in question could not be granted under such circumstances.¹⁸

(6) A last example of the reach of the useful effect principle concerns the obligation of equal treatment of both sexes contained in Article 119 of the Treaty.¹⁹ One of the main implementing directives of this obligation provides for adequate legal protection of victims of such discrimination, *inter alia*, by means of a civil claim for damages. Frequently, under national law such claims are subject to proof of fault. In *Dekker v. Sticht-*

17. *Factortame Ltd. v. Secretary of State for Transport*, Case C-213/89, [1990] E.C.R. 2433, [1990] 3 C.M.L.R. 1. In a later judgment concerning the substantive compatibility of the U.K. law prohibiting quota hopping by Spanish fishermen, the Court broadly interpreted the prohibition on discrimination according to nationality laid down in Article 52 of the Treaty concerning the freedom of establishment. *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, Case C-221/89, [1991] E.C.R. —, [1991] 3 C.M.L.R. 589, 626-28. The requirement that U.K.-registered vessels should be managed from the United Kingdom was compatible only under the proviso that this management was allowed to act on instructions sent from other Member States. *Id.* at —, [1991] 3 C.M.L.R. at 628. By means of this condition, a duty to respect the principle of proportionality is added to the duty not to discriminate on grounds of nationality. For more on this subject, see *infra* notes 26-28 and accompanying text.

18. *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe*, Joined Cases C-143/88 & C-92/89 (Eur. Ct. J. Feb. 21, 1991) (not yet reported).

19. EEC Treaty, *supra* note 3, art. 119.

ing *Vormingscentrum voor Jong Volwassenen (V.J.V. Centrum) Plus*,²⁰ Ms. Pacifica Dekker applied for a job when she was three months pregnant, and was refused the job on that ground. After Ms. Dekker sued, her employer argued that no fault attached to his actions. The Court ruled that the useful effect of the principle of equal treatment would be jeopardized if proof of fault were required in all civil claims for damages based on unequal treatment.²¹ Thus, the useful effect of Community law leads to objective tort liability, a legal construction which national legislators use only sparingly.

B. Other Forms of Teleological Methods of Interpretation

The useful effect principle is by no means the sole expression of the teleological method of interpretation. Very frequently the Court refers to the finalities of the Community provisions in question or to the objectives pursued by the Treaty. While these cases are too numerous to be listed in the context of this Article, two examples should suffice to show that this particular form of words leads to the same result as the useful effect principle.

The ECSC obtains its own financial resources from a levy on producers. An ECSC recommendation—which has the legal status of an EEC directive—obliges the Member States to ensure that Community claims for unpaid levies bear the same rank as claims of the national treasuries for tax arrears. In this context the question arose as to whether the Court of Justice, notwithstanding the narrow terms of Article 41 of the ECSC Treaty,²² as compared to Article 177 of the EEC Treaty, was empowered to answer a preliminary question of an Italian court concerning the rank of an ECSC claim. The Court replied in *ECSC v. Acciaierie e Ferriere Busseni SpA*²³ that the finality and coherence of the treaties required that the Court be able to ensure the uniform application of all Community norms, including those of the ECSC Treaty, and that Article 41 of the ECSC Treaty should be interpreted accordingly.²⁴

20. Case C-177/88 (Eur. Ct. J. Nov. 8, 1990) (not yet reported).

21. *See id.*

22. ECSC Treaty, *supra* note 6, art. 41.

23. Case C-221/88, [1990] E.C.R. 495.

24. *Id.* at 523-24.

The same quest for the comprehensive character of the Community legal order can be seen at work in a question of interpretation that arose under the first directive concerning legal persons. The complexities of the subject matter can be dispensed with here. Following earlier judgments, the Court confirmed in *Marleasing SA v. La Comercial Internacional de Alimentación SA*²⁵ first that the duty of cooperation with the Community laid down in Article 5 of the EEC Treaty also binds national courts, and then proceeded to say that this duty, seen in conjunction with the obligation of result contained in Article 189(3) of the Treaty, included the duty of national courts to interpret national laws implementing Community directives as much as possible in light of the text and the finality of the directive in order to achieve the intended result. In other words, even when dealing only indirectly with Community law, national judges must look at the matter through Community law glasses and not just take their usual national approach to questions of interpretation. This is a very wise precaution indeed, especially in view of the Anglo-Saxon preference for literal interpretation, even when it leads to clearly restrictive results when measured against the spirit of the law.

Yet another version of the teleological method of interpretation takes the shape of the requirement laid down by the Court that Community law, both primary and secondary, has to be interpreted, to the extent possible, in such a manner as to be in conformity with the provisions of the Treaty and with general principles of Community law.²⁶ Sometimes the reference to the Treaty is more specific and refers to the fundamental objectives of the Treaty or of the Community act under scrutiny. For example, in *Ministère Public and Ministre des Finances du Royaume de Belgique v. Ledoux*²⁷ the Court referred to the fundamental objectives of the harmonization of value added taxes, namely the free movement of persons and of goods and the prevention of double taxation.²⁸ As a result, Member

25. Case C-106/89 (Eur. Ct. J. Nov. 13, 1990) (not yet reported).

26. *Rauh v. Hauptzollamt Nürnberg-Fürth*, Case C-314/89 (Eur. Ct. J. Mar. 21, 1991) (not yet reported) (concerning common organization of market for milk).

27. Case 127/86, [1988] E.C.R. 3741, Common Mkt. Rep. (CCH) [1991] 1 CEC 28.

28. *Id.* at 3757, Common Mkt. Rep. (CCH) [1991] 1 CEC at 39. For similar references in the field of the freedom of establishment and the free movement of

States cannot charge VAT on the temporary importation of a car belonging to a market participant in one Member State, but used by an employee who lives in another Member State.

Ledoux is the first case in which the Court expressly related the duty of Member States to respect the finalities of the Treaty in respect of free movement of persons and of goods to the duty of cooperation contained in Article 5 of the Treaty. A reference of this kind makes the Article 5 duty of cooperation the legal basis of both the teleological method of interpretation and even of the Court's related insistence that the Treaty is more than an interdiction of discriminations by nationality and imposes over and above that interdiction a duty of justification and proportionality on Member States in the exercise of their retained powers. Restrictive effects on imported goods or services which result from disparities between non-discriminatory national measures are incompatible with the Treaty unless they can be justified by Treaty-compatible objectives and are proportional to that objective.²⁹

workers, see *Vlassopoulou v. Ministerium für Justiz, Bundes-und Europaangelegenheiten Baden-Württemberg*, Case C-340/89 (Eur. Ct. J. May 7, 1991) (not yet reported); *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (Unectef) v. Heylens*, Case 222/86, [1987] E.C.R. 4097, [1989] 1 C.M.L.R. 901; *Patrick v. Ministre des Affaires Culturelles*, Case 11/77, [1977] E.C.R. 1199, [1977] 2 C.M.L.R. 523; *Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris*, Case 71/76, [1977] E.C.R. 765, [1977] 2 C.M.L.R. 373.

29. For recent examples of this two-pronged test of compatibility with Articles 30 and 59 of the EEC Treaty, see *Aragonesa de Publicidad Exterior SA and Publivia SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, Joined Cases C-1 & C-176/90 (Eur. Ct. J. July 25, 1991) (not yet reported); *SCP Boscher, Studer and Fromentin v. SA British Motors Wright*, Case C-239/90 (Eur. Ct. J. Apr. 30, 1991) (not yet reported); *Freistaat Bayern v. Eurim Pharm GmbH*, Case C-347/89 (Eur. Ct. J. Apr. 16, 1991) (not yet reported); *Commission v. Italy*, Case C-180/89 (Eur. Ct. J. Feb. 26, 1991) (not yet reported); *SARPP v. Chambre Syndical des Raffineurs et Conditionneurs de Sucre*, Case C-241/89 (Eur. Ct. J. Dec. 12, 1990) (not yet reported); see also *infra* notes 108-13 and accompanying text (concerning Dutch media legislation).

Some authors practically ignore the justified objective and proportionality standard, or appear to think that it only apprehends more subtle discriminations. See, e.g., Giuliano Marengo & Karen Banks, *Intellectual Property and the Community Rules on Free Movement: Discrimination Unearthed*, 15 EUR. L. REV. 224 (1990); see also Giuliano Marengo, *Legal Monopolies in the Case-Law of the Court of Justice of the European Communities*, in 1991 FORDHAM CORP. L. INST. ch. 9 (Barry Hawk ed., 1992) (forthcoming). This approach fudges an important issue. The duty of Member States to justify obstacles to trade and keep them to a minimum ensures the supremacy of Community law over the exercise of retained powers in a much more comprehensive manner than a simple interdiction to discriminate against imported goods or services. The error

The fundamental objectives of the Treaty also underpin the case *Italy v. Drexel*.³⁰ The preservation of the freedoms granted by the Treaty requires national penal sanctions for infringement of VAT rules in case of temporary imports not to be heavier than the sanctions on VAT infringements in internal transactions. The same idea appears in the judgment in *Bessin et Salson S.A. v. Administration des Douanes et Droits Indirects*.³¹ National rules on the recuperation of an unpaid levy cannot legitimately render inoperative the rights given by Community law.

In a more abstract form, the *Rauh v. Hauptzollamt Nürnberg-Fürth* judgment discussed above is based on similar reasoning.³² Secondary Community law—the case in point concerning certain Common Agricultural Policy rules—must be interpreted to ensure its compatibility with the Treaty and with general principles of Community law. The latter concept is broader than the fundamental objective or the freedoms granted by the Treaty and includes, *inter alia*, the principles of proportionality and of equity.

The teleological method of interpretation also inspires the Court's insistence that the Community use its own general notions of law, and that these are not necessarily identical with those currently embodied in the national laws of the Member States. The Community frequently relies on such general concepts in making law. The Court has steadfastly insisted that the meaning of these notions is determined not by the national law of the Member States, but by the objectives and functions of Community law. Quite often, the point is emphasized by pointing to the need to ensure the uniform interpretation of Community law. Once more in the domain of the VAT directives, the Court ruled that concepts of Community law are not governed by national civil law but by Treaty finalities.³³ A

of the discrimination approach is well demonstrated by Von Oliver Dörr, *Die Warenverkehrsfreiheit nach Art. 30 EWG-Vertrag doch bloss ein Diskriminierungsverbot?*, 1990 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 677. For earlier rejections of the discrimination-only thesis, see PETER OLIVER, *FREE MOVEMENT OF GOODS IN THE EEC 168-70* (2d ed. 1988).

30. Case 299/86, [1988] E.C.R. 1213, [1989] 2 C.M.L.R. 241.

31. Case 386/87, [1991] E.C.R. ___, [1991] 1 C.M.L.R. 855.

32. See *supra* note 26 and accompanying text.

33. *Staatssecretaris van Financiën v. Shipping and Forwarding Enter. Safe BV*, Case C-320/88, [1990] E.C.R. 285; *Stichting Uitvoering Financiële Acties v. Staatssecretaris van Financiën*, Case 348/87, [1989] E.C.R. 1737, [1991] 2 C.M.L.R. 429.

good summary of this approach is contained in a case concerning the Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters.³⁴ In *Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst & Co.*,³⁵ where the meanings of the words "penal" and "tort matters" were at issue, the Court summarized earlier rulings as follows:

[H]aving regard to the objectives and general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned.³⁶

The coherence and comprehensiveness of the Community legal order are further ensured by judicial reception into Community law of a number of fundamental rights, such as the right to own property, the freedom of enterprise, and the freedom of contract.³⁷ Among the recent examples of this are the *Hauer v. Land Rheinland-Pfalz*³⁸ and *Schröder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau* cases.³⁹ In each of these preliminary cases the existence of these fundamental rights was recognized by the Court, although in the circumstances their violation was denied.

To end this review of the various garbs in which the Court dresses its teleological method of interpretation, a few even more general formulas should be noted. The first one is known as the *Ramel* formula, after the case *Société Les Commissionnaires Réunis S.à.r.l. and S.à.r.l. Les Fils de Henri Ramel v. Receveur des Douanes*,⁴⁰ in which the Court ruled that the Community was obliged to exercise its powers "from the perspec-

34. J.O. L 299/32 (1972), *amended*, O.J. L 304/77 (1978), *amended*, O.J. L 388/1 (1982), *amended*, O.J. L 285/1 (1989).

35. Case 189/87, [1988] E.C.R. 5565, Common Mkt. Rep. (CCH) [1990] 2 CEC 22.

36. *Id.* at 5585, Common Mkt. Rep. (CCH) [1990] 2 CEC at 35.

37. See David Edward, *Constitutional Rules of Community Law in EEC Competition Cases*, 13 FORDHAM INT'L L.J. 111, 117 (1989-1990).

38. Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

39. Case 265/87, [1989] E.C.R. 2237.

40. Joined Cases 80 & 81/77, [1978] E.C.R. 927, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8485.

tive of the unity of the [Common Market]."⁴¹

The Court returned to this theme a few years later and repeated that the powers granted in the framework of the Common Agricultural Policy had to be exercised from that same perspective.⁴² As a result, measures which infringe the abolition of customs duties and quantitative restrictions must be avoided. This principle does not exclude temporary measures designed to redress distortions in the conditions of competition within the Common Market. Such measures, however, are only legitimate insofar as they are strictly proportional to the distortion in question, and the causes of the distortions are addressed at the same time with a view to their elimination. In other words, in the long term the finalities of the Treaty must always prevail.

This same objective can be discerned in yet another technique of interpretation used by the Court. The Court occasionally underlines the preeminence of economic reality over formal criteria. The most well-known example is *SA Binon and Cie. v. SA Agence et Messageries de la Presse*,⁴³ where this is stated in so many words.⁴⁴ The recent judgment in *Commission v. Greece*⁴⁵ concerning the Greek state oil monopoly for import, export, refining, and distribution of crude oil and oil products provides a more indirect example. The Commission did not seek to abolish the refining monopoly, but requested all the same that the Court declare the Greek refusal to abolish the import monopoly for crude oil a violation of Article 37 of the Treaty.⁴⁶ This position amounts to a purely formal abolition of an import monopoly, because even after this abolition there remains a single potential transformer of imported crude, namely the state-owned and controlled refinery. Especially in view of the bulk commodity concerned, the Commission's attitude was timorous and even mildly hypocritical. The Court did not hazard its reputation for such an approach and, notwithstanding the rather restrictive result of its ruling, re-

41. *Id.* at 947, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) at 8710.

42. *United Kingdom v. Commission*, Case 61/86, [1988] E.C.R. 431, 462, [1987-1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,478, at 18,464.

43. Case 243/83, [1985] E.C.R. 2015, [1985] 3 C.M.L.R. 800.

44. *Id.* at 2040, [1985] 3 C.M.L.R. at 825.

45. Case C-347/88 (Eur. Ct. J. Dec. 13, 1990) (not yet reported).

46. See EEC Treaty, *supra* note 3, art. 37.

jected the Commission's request on this point.⁴⁷

This brings us to my last example of teleological interpretation, one in which no reference is made to any of the techniques mentioned above: that is, situations in which the Court just acted teleologically! The example on point is the Court's definition of discrimination by nationality in the meaning of Article 7 of the Treaty. On several occasions the Court stressed that Article 7 of the Treaty does not only prohibit ostensible discriminations on the basis of nationality, but also dissimulated and disguised forms that, while using other criteria, have the same result.⁴⁸

II. THE RELEVANCE OF THE GENERAL PRINCIPLES OF INTERPRETATION USED BY THE COURT FOR THE APPLICATION OF THE EEC COMPETITION RULES

The key word is coherence. In respect of the EEC system of undistorted competition, the comprehensive and self-contained character of the Community's legal order is ensured by the systematic rejection of restrictive interpretations of the competition rules. Instead, the Court picks its way through the thicket of conflict and controversy, which springs up around any form of competition control, with a constant regard for the effect of its interpretations on the achievement of the fundamental objective of undistorted competition and the market access that such competition presupposes.

Naturally, the Court takes account of the fact that the competition rules impose duties that are enforceable by financial penalties on undertakings. The comprehensive character of the interdictions must therefore be reconciled with the need for legal certainty as to the scope of the rules. However, the way out of this dilemma resides mainly in the procedures of Council Regulation No. 17/62⁴⁹—negative clearance or exemption—and not in interpretations that ignore the function

47. *Greece*, slip op. ¶¶ 31-37.

48. *See, e.g.*, *Biehl v. Administration des Contributions du Grand-Duché de Luxembourg*, Case C-175/88, [1990] E.C.R. 1779, 1792-95, [1990] 3 C.M.L.R. 143, 150-52; *cf.* *Roviello v. Landesversicherungsanstalt Schwaben*, Case 20/85, [1988] E.C.R. 2805, 2852, Common Mkt. Rep. (CCH) [1990] 1 CEC 410, 437.

49. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87 [hereinafter Council Regulation No. 17].

of the competition rules, namely to underpin, on the level of individual market participants, the obligations of Member States in respect of a single market to which all market participants within the jurisdiction of the Community have an equal right of access.

Seen in this light, it remains perfectly correct and understandable that the Court, parallel to its general strategy of Treaty interpretation and encouraged by the broad terms of Articles 85 and 86 of the Treaty, systematically supports the all-embracing character of the system of undistorted competition that is referred to in Article 3(f) of the Treaty.⁵⁰ When efforts are made to reduce the scope of Articles 85 and 86, the Court, sometimes with more assurance than the Commission, upholds the dynamic approach. As a result, the competition rules apply, *inter alia*,

- (1) to actual as well as potential competition;
- (2) to horizontal as well as vertical restrictions;
- (3) to intrabrand as well as to interbrand competition;
- (4) to licensing agreements whenever these contain restrictions going beyond what is necessary to protect the essence of the licensed right;
- (5) to synallagmatic as well as unilateral restrictive actions by non-dominant enterprises, whenever this unilateral conduct takes place in a synallagmatic context and gives this context the restrictive twist it would not have without the unilateral action;
- (6) to agreements which are restrictive by their very nature and to agreements which only become so by virtue of their context, such as bundles of identical supply or agency contracts in a branch of trade or industry;
- (7) to enterprises in the broadest sense of the term, including branches of state organs acting as enterprises;
- (8) to public as well as private enterprises;
- (9) to restrictive conduct mooted outside the Community but implemented within it.

To complete and strengthen this seamless web of the system of undistorted competition, the Court relies on Article 5 of the Treaty to define a legal obligation of the Member States

50. EEC Treaty, *supra* note 3, art. 3(f).

not to interfere with that system when exercising retained powers. These past efforts of the Court towards coherence and comprehensiveness in the domain of EEC competition law continue in the most recent case law, as the following examples may show.

A. *The Delimitis Case and Foreclosure of Markets Through Bundles of Exclusive Distribution Contracts*

The *Delimitis v. Henninger Bräu AG*⁵¹ case confirms the Court's continued concern for the comprehensive character of the EEC competition rules. The case also shows that this concern is pursued with a high degree of economic realism and a good sense of balance. The Court is obviously aware that comprehensiveness should not lead to overextension of the rules.

The relevant facts were as follows: A publican who operated a small-tied house had terminated his contract with a brewery for reasons of health. When he was faced with a claim of roughly DM6,000, *inter alia*, for non-respect of his obligation of minimum sales of beer, he attempted to nullify his contract on the ground that it was part of a bundle of similar contracts that taken as a whole infringed Article 85(1) of the EEC Treaty and fell outside the group exemption of Regulation No. 1984/83.⁵² In other words, Mr. Delimitis's obligations were part of a contract that came within the interdiction of Article 85 only because of its wider context that included the existence of

51. Case C-234/89 (Eur. Ct. J. Feb. 28, 1991) (not yet reported). What is known as the bundle theory was first formulated in *S.A. Brasserie de Haecht v. Wilkin & Wilkin*, Case 23/67, [1967] E.C.R. 407, 415, [1968] C.M.L.R. 26, 40, and reaffirmed in the case *Erauw-Jacquery SPRL v. La Hesbignonne SC*, Case 27/87, [1988] E.C.R. 1919, 1940, [1988] 4 C.M.L.R. 576, 590, and implicitly in *France v. Commission*, Case C-202/88, slip op. ¶¶ 54-57 (Eur. Ct. J. Mar. 19, 1991) (not yet reported) [hereinafter *Telecom*]. *Telecom* concerned the potential anti-competitive effects of long term contracts concluded by dominant undertakings. Paragraph 13 of the *Delimitis* judgment has an interesting implication for another issue. Although the contract contained an exclusivity clause, the Court considered that this did not bring it automatically within the purview of Article 85(1) of the EEC Treaty, thus confirming that this issue is governed by objective economic realities and not by formal criteria concerning the future freedom to contract. This is fully in line with the Court's position in the "maize seed" case, *Nungesser (L.G.) KG and Kurt Eisele v. Commission*, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278.

52. Commission Regulation No. 1984/83, O.J. L 173/5 (1983), *corrected version* in O.J. L 281/24 (1983).

many similar agreements, the cumulative effect of which was to foreclose the matter.

A Frankfurt court wished to know in the first place whether even a minor contribution to foreclosure should enable a party to nullify his contract under Article 85(2). In its reply, the Court firmly upheld the potential applicability of Article 85(1) to the foreclosure effects of bundles of contracts, but at the same time defined the parameters of a full market analysis in a manner which ensures that the interdiction focuses on substantial contributions to foreclosure, especially within an oligopoly.⁵³ The comprehensiveness of the field of application of Article 85(1) is served by concentrating on anti-competitive contractual structures of significant size. Critics of the bundle theory should welcome this clarification.

A second question of the Frankfurt court concerned the powers of the national courts in respect of such minor contributions to foreclosure that the agreement either escaped Article 85(1) altogether or was clearly exemptible, even though it was formally outside the group exemption for exclusive beer purchasing contracts. The Frankfurt court wished to know whether this was indeed the law, or whether it had power to anticipate a formal exemption by the Commission and to treat the contract as valid and legally binding, thereby possibly encroaching on the Commission's exclusive right to exempt.⁵⁴

The Court of Justice replied with an elaborate restatement of the borderline separating the respective powers of the Commission and the national courts. The national courts are empowered to treat contracts as valid "where the conditions of application of Article 85(1) are manifestly not fulfilled and therefore there is no risk that the Commission would decide otherwise."⁵⁵ The national courts are also empowered to decide on the incompatibility of a contract with Article 85(1) where there is no likelihood whatsoever that an exemption may be obtained.⁵⁶

53. These parameters are contained in paragraphs 19-26 of *Delimitis*, and more particularly in paragraph 22, which refers to oligopolistic market conditions, and paragraph 24, which speaks of substantial contributions to foreclosure.

54. See Council Regulation No. 17, *supra* note 49, art. 9(1), O.J. Eng. Spec. Ed. 1959-62, at 89.

55. *Delimitis*, slip op. ¶ 50.

56. *Id.*

Beyond cases of clear inapplicability of the interdiction or of clear and unexemptible incompatibility, the Court of Justice referred national courts to the duty of cooperation contained in Article 5 of the Treaty, as defined most recently in the *Re J.J. Zwartveld* case.⁵⁷ The obvious objective of this cooperation must be that the risk of contradictory decisions is eliminated. In clear language this means that where the Commission intimates that in its opinion the restriction is exemptable, national courts may anticipate and treat the contract as valid. The process may sound laborious, but it surely contributes to weaving together the direct applicability of Article 85(1) and the Commission's exclusive power to exempt into the type of seamless web that is needed to ensure the coherence of the Community legal order.

B. Foreclosure of Markets by Legal Monopolies

Monopolies of this kind are governed principally by Article 90 of the Treaty. This provision is one of the main examples of the Treaty's thrust towards seamlessness and comprehensiveness. It ensures that the Member States may not use their public or concessionary enterprises, whether public or private, to evade other Treaty obligations. The enterprises concerned are also fully bound by the Treaty and in particular by the competition rules. These principles are moderated by Article 90(2) insofar as full Treaty application would hinder in law or in fact the particular tasks entrusted to the enterprises concerned.⁵⁸

Most of the larger public enterprises still in existence in the Community—including coal mining, rail transport and the like—are the result of policy-driven nationalizations or constitute historic manufacturing and trading monopolies, such as the tobacco products monopolies in some Member States. A third category of monopolies reflects national air-space and radio-wave sovereignty, and the landing or transmission rights granted thereunder. Moreover, a number of concessionary activities reflect a particularly strong regulatory interest of the

57. Case C-2/88, [1990] E.C.R. —, —, [1990] 3 C.M.L.R. 457, 463.

58. For an overview of the principal theoretical issues raised by Article 90 of the Treaty, see Richard Wainwright, *Public Undertakings Under Article 90*, in 1989 FORDHAM CORP. L. INST. 239 (Barry Hawk ed., 1990).

Member States concerned, often for environmental reasons.⁵⁹ Notwithstanding the clear objective of Article 90, the Commission has been slow to implement its provisions. As a result, within the domain of application of Article 90, the comprehensive character of Community law has been slow to unfold.

The main taboo that had to be overcome was created by Article 222 of the Treaty, which stipulates that the Treaty does not affect the system of property ownership in the Member States.⁶⁰ As a result, the decision as to the size and composition of the public and concessionary sectors of a national economy is a retained power of the Member States. However, the insight has gradually developed that this policy-oriented recognition of the right of Member States to extend their public sectors by means of nationalization, or through the creation of additional public enterprises or concessionary activities, does not mean that the exercise of this particular retained power should not remain under the general obligation of the Member States to respect the fundamental objectives of the Treaty.⁶¹

The Court was the first to be confronted with these issues and, given the hypersensitive area of national policy concerned, addressed them with characteristic foresight and prudence. Faced with preliminary questions concerning the Italian television monopoly, a combination of public enterprise and exclusive rights, it recognized the right of a Member State to remove certain sectors of the economy from the field of competition, although only for non-economic reasons of public interest.⁶² Today, this relatively early ruling must be read in conjunction with the Court's general case law under Articles 30 to 36 and 59 of the Treaty, which concern the exercise of

59. Examples that reached the Court are *Bodson v. Pompes Funèbres des Régions Libérées SA*, Case 30/87, [1988] E.C.R. 2479, Common Mkt. Rep. (CCH) [1990] 1 CEC 3 (undertaking); *Openbaar Ministerie v. Nertsvoederfabriek Nederland BV*, Case 118/86, [1987] E.C.R. 3883, [1989] 2 C.M.L.R. 436 (rendering); *Procureur de la République v. Association de Défense des Brûleurs d'Huiles Usagées*, Case 240/83, [1985] E.C.R. 531, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,164 (used oil).

60. EEC Treaty, *supra* note 3, art. 222.

61. It is appropriate to recall in this context the Court's observation in *Commission v. Federal Republic of Germany*, Case 153/78, [1979] E.C.R. 2555, [1980] 1 C.M.L.R. 198, according to which Article 36 of the EEC Treaty does not reserve the areas of national regulation mentioned therein to exclusive national jurisdiction. *Id.* at 2564, [1980] 1 C.M.L.R. at 207.

62. *State v. Sacchi*, Case 155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177.

powers retained by the Member States that may affect the proper functioning of the Common Market. According to this case law, any such exercise must respect the fundamental objectives of undistorted competition in a single market. Even non-discriminatory national measures are only compatible with the Treaty if they can be justified by mandatory requirements of Treaty-compatible national objectives.⁶³

The testing ground for this newer thinking concerning Article 90 has been provided by the two telecommunications directives of the Commission⁶⁴ and several individual decisions concerning postal monopolies,⁶⁵ all based on Article 90(3). The first telecommunications directive was recently upheld in part by the Court in *France v. Commission* ("Telecom"),⁶⁶ which seized the opportunity to focus once more on the fundamental nature of Article 90. According to paragraph 12 of this judgment, Article 90 aims to reconcile the interest of the Member States to use certain firms, in particular those of the public sector, as instruments of national economic or fiscal policy with the Community interest in undistorted competition in a single market.⁶⁷ The message is clear. The Court sees the measures governed by Article 90 for what they are, namely measures of national economic or fiscal policy. The subjection of these measures to the Treaty necessarily means that they are subject to the same requirements of Treaty compatibility as all other such policy measures, namely non-discrimination, and a justi-

63. For recent case law on this point, see *supra* notes 27-29 and accompanying text (discussing *Ministère Public and Ministre des Finances du Royaume de Belgique v. Ledoux*, Case 127/86, [1988] E.C.R. 3741, Common Mkt. Rep. (CCH) [1991] 1 CEC 28). The rule may be described as a common denominator of all Treaty provisions moderating in substance or in procedure the fundamental rules of the Treaty in the light of other legitimate objectives. Other provisions which reflect this idea are EEC Treaty Articles 57(2), 66, 73, 77, 85(3), and 92, the first sentence of Article 92(3)(c), the second paragraph of Article 95, the second paragraph of Article 101, Articles 103, 107, 108, 115, 130(r), 223(1)(a) and (b), 224, 225, and the second and third paragraphs of Article 234. EEC Treaty, *supra* note 3.

64. Commission Directive No. 90/388, O.J. L 192/10 (1990); Commission Directive No. 88/301, O.J. L 131/73 (1988); see COMMISSION TWENTIETH REPORT ON COMPETITION POLICY 51-54 (1991).

65. *Re International Express Courier Services*, O.J. L 233/19 (1990), Common Mkt. Rep. (CCH) [1990] 2 CEC 2087; *Re Express Delivery Services*, O.J. L 10/47 (1990), [1989-1990 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 95,358.

66. Case C-202/88 (Eur. Ct. J. Mar. 19, 1991) (not yet reported).

67. *Id.* slip op. ¶ 12.

fied objective and proportionality standard.⁶⁸ Proceeding from this vantage point, the Court upheld the Commission's directive, which stripped the national telecommunications monopolies of all but those exclusive rights for which there is a public service justification. Beyond that justification, the power to establish legal monopolies liable to affect intra-Community trade can no longer be validly exercised.

The framework of this Article does not allow an analysis of all the implications of this development. The narrower focus here is on the implications of this approach for the remaining national legal monopolies, whether for the production of goods or the supply of services. In this context some other recent case law concerning monopoly rights is relevant. It should be stressed from the outset, however, that the Court's case law under Article 177, probably because of the constraints of judicial cooperation, combined occasionally with a rather formalistic Commission contribution, does not appear to be fully synchronized with its approach on appeal from Commission acts, either based on Article 169⁶⁹ or on Article 173.⁷⁰

The first case on point involves the Greek crude oil import and refining monopoly already referred to above, *Commission v. Greece*.⁷¹ The Court's refusal to condemn an import monopoly as long as the Commission tolerates a corresponding manufacturing monopoly contains an implicit invitation to the Commission to question the Treaty compatibility of the latter in the light of newer case law concerning legal monopolies, possibly in combination with Article 52's right of establishment⁷² and Article 67's freedom of movement of capital.⁷³ In other words, the Commission is prompted to ask the Greek government the reasons of non-economic public interest which in its view justifies the preservation of the monopoly in question. The *Campus Oil Ltd. v. Minister for Industry and Energy*⁷⁴ case shows that it will not be easy to find sufficient reasons of that kind.

The compatibility of the German labor exchange monop-

68. See *supra* notes 27-29 and accompanying text.

69. EEC Treaty, *supra* note 3, art. 169.

70. *Id.* art. 173.

71. Case C-347/88 (Eur. Ct. J. Dec. 13, 1990) (not yet reported).

72. EEC Treaty, *supra* note 3, art. 52.

73. *Id.* art. 67.

74. Case 72/83, [1984] E.C.R. 2727, [1984] 3 C.M.L.R. 544.

oly was the subject of the *Höfner and Elser v. Macrotron, GmbH*⁷⁵ case. Here the Court speaks of the Treaty conditions which Member States have to respect when granting exclusive or special rights. An explicit reference to national economic policy is lacking, but the wording chosen is a step in the same direction: the state action *granting* the rights in question must conform to Treaty rules.⁷⁶

The legal monopoly in question is general in law, covering all types of jobs, but is not exercised in respect of executive jobs. The question arose whether private headhunting firms could operate legitimately in that market or whether such activities infringed the monopoly. The case was raised on the more narrow basis of Article 86 and the Court therefore limited itself to that ground. It ruled that the granting of an exclusive right that would lead necessarily to an abuse of dominant position was incompatible with the Treaty.⁷⁷ Such an abuse occurs when a legal monopoly which in fact does not cover the whole market assigned to it prevents others from filling the gap. This was more particularly the case when the grantee of an exclusive right was manifestly not capable of satisfying the demand it was supposed to meet, thus fulfilling the criterion of Article 86(b), which qualifies as abusive a limitation of production or markets to the prejudice of consumers. In other words, the granting of an underextended exclusive right violates Article 90(1) just as an overextended exclusive right does. Coherence with the result of the *Telecom* judgment is ensured, but the reasoning is unnecessarily formalistic. A national measure of economic policy, which on the one hand addresses only part of the demand for a service and on the other hand denies other Common Market operators the freedom to provide services to fill the gap, is clearly incompatible with the obligation to contribute to undistorted competition in a single market.

Another limitation on the power to create legal monopolies was defined by the Court in the cases *In re Delattre*⁷⁸ and *In re Monteil and Samanni*.⁷⁹ Pharmacists enjoy a retail monopoly

75. Case C-41/90 (Eur. Ct. J. Apr. 23, 1991) (not yet reported).

76. *Id.* slip op. ¶ 16.

77. *Id.* ¶ 27.

78. Case C-369/88 (Eur. Ct. J. Mar. 21, 1991) (not yet reported).

79. Case C-60/89 (Eur. Ct. J. Mar. 21, 1991) (not yet reported).

for all products defined as pharmaceutical or medicinal. The precise scope of these product categories varies among the Member States. Borderline items such as slimming products and cosmetics may be in free commerce in one Member State and under the pharmacists' monopoly in another. This disparity may inhibit intra-Community trade in such products. When interrogated on the point, the Court held that the exclusive rights of pharmacists were compatible with Articles 30 to 36 *only* if counterproof were admissible that the inclusion of certain products, such as those that favor digestion, circulation, weight loss, or combat fatigue, is disproportionate to the health or consumer protection at stake.⁸⁰ Here again, the Court kept the power to grant exclusive rights subject to the general duty of Member States to respect the fundamental Treaty objectives and the proportionality principle. Although in these cases Article 90 is not mentioned, the result is very similar to cases where that provision was addressed.

The same approach returns in the Greek television monopoly case, *Elliniki Radiophonia Tiléorassi—Anonimi Etairia (ERT-AE) v. Pliroforissis Dimotiki Etairia (DEP)*.⁸¹ This monopoly covered both the transmission of self-produced programmes and re-transmission of imported programmes. The city of Thessaloniki, in Macedonia, set up a municipal television station and was duly sued by the state monopoly for infringement of its exclusive right. Curiously enough, the referring court did not raise questions under Article 90, but submitted elaborate questions as to the compatibility of the Greek law granting the monopoly, *inter alia*, with Treaty Articles 3(f), 9, 30, 36, 85, and 86.⁸² The Court itself added Article 59 of the EEC Treaty on the freedom to provide services,⁸³ and then proceeded to reply under Article 90.

First, it recalled its ruling in *State v. Sacchi*⁸⁴ that Member States are entitled to decide, for non-economic reasons of pub-

80. *Id.* slip op. ¶¶ 43-44; *Delattre*, slip. op. ¶¶ 56-57.

81. Case C-260/89 (Eur. Ct. J. June 18, 1991) (not yet reported) [hereinafter ERT].

82. The request for a preliminary ruling also raised some questions concerning Article 2 of the EEC Treaty, *supra* note 3, and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955). In the present context the latter questions are not relevant.

83. See EEC Treaty, *supra* note 3, art. 59.

84. Case 155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177.

lic interest, to remove certain activities from the field of competition. In terms that are in essence identical to those of the *Höfner* case,⁸⁵ the Court reaffirmed that this freedom is not absolute but only relative.⁸⁶ The manner in which monopolies are organized and used must respect the free circulation of goods, the freedom to provide services, and the competition rules.

Probably because this case, like other recent ones, was pleaded and prepared before the Court had qualified the powers addressed by Article 90 as measures of national economic policy,⁸⁷ the reasoning then fell back into the trodden path of a discrimination analysis, rather than proceeding to an application of the broader standard of justification by a Treaty-compatible national objective and of proportionality.

As in the Greek crude oil import and refinery monopoly situation, the Court treated the import monopoly of materials and products for transmission as ancillary to the transmission itself and incompatible only when imported products would be discriminated against, directly or indirectly.⁸⁸ Had the Court applied, as it could have done, the justified objective and proportionality standard, the result on this point might have been different. The fact that there is only a single public buyer of a product or a service in a Member State does not necessarily imply that a single importer is also compatible with the Treaty. There is no reason why suppliers from other Member States should not have direct and factory-delivered access to the single public buyer, especially because public procurement is under Community rules of procedure and substance.

In its analysis under Article 59 the Court also showed its habitual prudence in Article 177 cases. Following a weak economic analysis presented by the Commission, the Court left it to national courts to decide whether an accumulation of an exclusive right to transmit and an exclusive right to re-transmit programmes from other Member States might possibly consti-

85. *Höfner and Elser v. Macrotron, GmbH*, Case C-41/90 (Eur. Ct. J. Apr. 23, 1991) (not yet reported).

86. *ERT*, Case C-260/89, slip op. ¶ 10 (Eur. Ct. J. June 18, 1991) (not yet reported).

87. See *supra* notes 64-68 and accompanying text.

88. See *Commission v. Greece*, Case C-347/88 (Eur. Ct. J. Dec. 13, 1990) (not yet reported); *supra* notes 45-47 and accompanying text (discussing *Greece*).

tute a source of discrimination.⁸⁹ It would have been more helpful if the Court had referred to ERT's self-interest that normally will lead it to prefer to transmit the whole of its own production of programmes and only re-transmit from other Member States to fill the remainder of its transmission time. In fact, the Greek arrangements amount to a de facto sales guarantee for national goods and services, which leaves only the residual demand to imports. Such a broadly defined sales guarantee cannot objectively be justified on grounds of cultural policy, and is surely not proportional to the possibly legitimate objectives of such a policy. It is only when addressing the grounds enumerated in Articles 56 and 66 of the Treaty, namely public order, security or health, as possible justification for potential discrimination that the Court became more critical. The Greek appeal to these grounds was based on the argument that interference between a limited number of transmission channels needed to be avoided. As ERT itself only used a limited number of all available channels, the Court rejected this "justification" of the retransmission exclusivity.⁹⁰ The parallel with the underused monopoly of the German job clearance office is clear.

Finally, under Article 86 the Court did what it could have done already under Article 59, namely imply that the re-transmission monopoly constitutes a sales guarantee for the dominant firms' own production, that is, a form of economic protection of ERT's market and not an exclusion of competition for non-economic reasons.

This laborious implementation of an essentially correct broad interpretation of Article 90(1) should not make us lose sight of the fundamental significance of a compatibility test for all national legal monopolies, whether for goods or for services. The more convincing approach is that of the *Telecom* judgment considered above,⁹¹ in which direct access of all suppliers to all customers was considered an essential element of undistorted competition in a single market.⁹² Monopolies or exclusive rights which inhibit this direct access are incompati-

89. *ERT*, slip op. ¶¶ 16, 23.

90. *Id.* ¶ 25.

91. Case C-202/88 (Eur. Ct. J. Mar. 19, 1991) (not yet reported); see *supra* notes 66-67 and accompanying text (discussing *Telecom*).

92. *Telecom*, slip op. ¶¶ 34-44.

ble with the fundamental objectives unless a Treaty-compatible justification can be given and unless the measure is proportionate to that objective.⁹³

This shows that provided the Commission takes the lead, the Court is willing to abandon the narrow approach of vetting discriminations and/or specific violations of Article 86. The curious thing is that in Article 177 cases the Commission itself continues to do just that, although in its telecommunications directives it has broadened its approach. It is submitted that there is still a need to ensure more coherence in the Commission's approach in these matters.⁹⁴

At this stage the question arises whether the state of the law sketched above has implications for the few remaining production monopolies in the Community, such as electricity and tobacco products. More specifically, the question is whether under the existing EEC Treaty there is or in the future will be

93. This general limitation of the power to grant monopolies is not limited to the domain of public legal monopolies. The limits placed by Article 36 of the Treaty on the private monopolies held by owners of industrial property rights are well known, and have recently been confirmed in the Irish television guide case, *Radio Telefis Eirann v. Commission*, Case T-69/89, [1991] E.C.R. __, [1991] 4 C.M.L.R. 586 (Ct. First Instance) [hereinafter RTE]. Following in the footsteps of the Court of Justice, the Court of First Instance kept the legal monopolies granted by national intellectual property laws firmly subject to the Treaty obligation not to compartmentalize the market and not to impair the system of undistorted competition. *See id.* at __, [1991] 4 C.M.L.R. at 616. Under the circumstances of the case, the Commission rightly considered RTE's refusal to license the copyright on its programme information as unjustified by the need to protect the essence of the copyright in question. Echoes of the judgment in *State v. Sacchi*, Case 155/73, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177, are heard in the Court's reasoning. *RTE*, [1991] E.C.R. at __, [1991] 4 C.M.L.R. at 620. The economic motive of the protection of RTE's own television guide is not considered to be covered by the essence of copyright as recognized in Community law.

94. More light on these issues was shed by the judgment of the Court of Justice in *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, Case C-179/90 (Eur. Ct. J. Dec. 10, 1991) (not yet reported), which concerned certain monopoly positions in cargo handling at the port of Genoa and the restrictive and abusive effects thereof. *See infra* notes 114-17 and accompanying text (discussing *Merci Convenzionali Porto*). According to Advocate General Walter Van Gerven in his submissions of September 19, 1991, the monopoly positions in question contained clear discrimination on the basis of nationality that created a direct incompatibility with Articles 7, 48 or 52, and 59 of the EEC Treaty. *See Opinion of Advocate General Van Gerven, Merci Convenzionali Porto*, slip op.; *see also* EEC Treaty, *supra* note 3, arts. 7, 48, 52, 59. In such circumstances, the question of the existence of a justified objective and the issue of proportionality do not arise. However, in the approach advocated here, once a monopoly has been stripped of discriminations and/or abuses, its creation as such is still subject to the justified objective and proportionality standard.

an obligation for the Member States that maintain such monopolies to allow other Community subjects to establish themselves on their territory for the purpose of producing the goods and services in question. In other words, what is the exact balance between, on the one hand, undistorted competition in a single market, including the freedom of establishment and the freedom of capital movement, as protected by Article 90, and on the other hand, the right of Member States to create public enterprises and give them an exclusive right to produce?

In the present state of Community law the answer is necessarily speculative. One point only is certain. There is no Community law obligation to privatize existing nationalized industries or to abstain from the creation of new public enterprises. This point is covered by Article 222 of the Treaty.⁹⁵ The only question is the extent to which a national public interest of a non-economic nature justifies legal monopolies in favor of such enterprises. Here again there is only one certainty, and that is that the Community must also recognize the phenomenon of natural monopolies—that is, situations in which competition is either technically impossible or without objective economic interest. Where such monopolies are supported by legal monopolies, the State measure has no real economic effect with respect to the attainment of Treaty objectives.

The real difficulties lie with public service monopolies, such as electricity, gas, transport, and betting, and with production monopolies, such as arms and ammunition or tobacco products. Here the question is whether the enterprises concerned, state-owned or not, must necessarily remain in a legal monopoly situation, that is to say, protected from competition not only from other Member States but also by other manufacturers from within the same territory.

The reply must first of all take into account that the firms concerned and their home markets are subject to competition from imported goods or from services rendered from other Member States. Article 37 of the Treaty guarantees the first,⁹⁶ and Articles 55 to 60 and 75 to 84 the second, type of competi-

95. EEC Treaty, *supra* note 3, art. 222.

96. *Id.* art. 37.

tion.⁹⁷ In that domain, however, a difficulty arises with respect to goods, services such as electricity and gas, and telecommunications that can reach the consumers only through cable networks, pipelines or hertzian waves. The administrative action of the Commission considers the networks in the field of cable telephone to constitute natural monopolies, provided they are open to imported goods and services.⁹⁸ This point was not contested in the *Telecom* case and can be considered as settled. Its extension into other areas is under way. The transit of electricity through main grids and of natural gas through high-pressure transmission grids is already the subject of a Council directive,⁹⁹ although not on the basis of Article 90, but on the basis of Article 100A.¹⁰⁰

This leaves us with the few remaining pure production monopolies, mainly electricity and tobacco products. Such monopolies exist in France, Greece, Italy, Portugal and Spain. The case for electricity monopolies is relatively strong as far as supplies to domestic users are concerned. The public service requirements of uninterrupted and ubiquitous supplies require a high degree of investment planning, which is just not possible if the end users would be completely free to buy whenever and wherever it happened to be cheaper for them to do so. On the other hand, large industrial users already have the right to self-produce electricity, and this can possibly be extended to further categories of such users and to imports either through their own lines or even through third party access to grids. Rate alignment would, however, appear to be more rational under the circumstances of the industry.

The most difficult to justify are the production monopolies for tobacco products. Their origin is mostly fiscal. Less fiscally restrictive and equally effective solutions have been

97. *Id.* arts. 55-60, 75-84.

98. See *supra* note 64 and accompanying text (discussing telecommunications directives).

99. Council Directive No. 90/547, O.J. L 313/30 (1990); see Council Directive No. 91/296, O.J. L 147/37 (1991). Similar measures concerning railroad networks are under consideration. Following the Commission's decision in *Ijsselcentrale*, No. 91/50, O.J. L 28/32 (1991), Common Mkt. Rep. (CCH) [1991] 1 CEC 2029, the Dutch electricity producers have declared that they will no longer prevent imports and certain exports of electricity by industrial users.

100. EEC Treaty, *supra* note 3, art. 100A, as amended by Single European Act, O.J. L 169/1 (1987).

adopted with respect to alcoholic beverages. The simple reassertion of national policy decisions of a more or less distant past is no longer convincing enough to set aside the freedom of establishment and the freedom of capital movement. At a minimum, the resulting foreclosure of markets should be tested against the standards applied by the Court in other monopoly situations, namely the presence of a public interest of a non-economic nature, recognized in Community law, and the proportionality of the measure taken with mandatory requirements inherent in that interest. Under the latter heading the Community's interest in undistorted competition in a single market is of increasing importance. In a number of instances, the outcome of such a test might well be that refusals to permit other operators to produce in the markets concerned is no longer justified under Community law.

C. Balanced Comprehensiveness in Three Other Recent Leading Cases: Hag II, AKZO, and Dutch Media Legislation

1. Hag II

In *S.A. CNL-Sucal NV v. Hag GF AG* ("*Hag II*"),¹⁰¹ the Court abandoned the so-called common origin doctrine, under which similar products produced by different manufacturers holding identical trademarks which initially had been the property of one owner, could circulate freely in the whole of the Common Market, subject to precautions against the danger of confusion in the mind of purchasers.¹⁰² Under that principle, the free circulation of goods prevailed over the pre-EEC tribulations of a trademark.

Hag II adopts a different balance. The essential function of trademarks is to allow consumers to link the quality of performance with the identity of the supplier. This function is described as an essential element of the system of undistorted competition. Whenever the guarantee fails to ensure that an identical trademark stands for a single responsibility for quality, the free circulation of the products concerned will compromise this essential function.¹⁰³ Under the particular circumstances of the case, undistorted competition prevails over the

101. Case C-10/89, [1990] E.C.R. __, [1990] 3 C.M.L.R. 571.

102. See *id.* at __, [1990] 3 C.M.L.R. at 608-09.

103. *Id.* at __, [1990] 3 C.M.L.R. at 608.

free circulation of goods. In other words, undistorted competition is not an abstract concept but includes a qualitative content. Where this content is lacking, the Treaty does not protect the free circulation of goods as the very embodiment of competition from the effects of national trademark laws.

This refinement of the case law demonstrates the sense of balance the Court brings to its efforts to ensure the primacy of the fundamental objective of undistorted competition in a single market.¹⁰⁴

2. *AKZO Chemie BV v. Commission*

The *AKZO Chemie BV v. Commission*¹⁰⁵ case is relevant in the present context on two points. One of AKZO's main arguments ran as follows: because it recovered the whole of the fixed costs of producing organic peroxides from the prices obtained from its regular customers, it should be free to sell at prices below or close to average variable costs when attempting to enlarge its client base. The practical implications of this type of reasoning are obvious. Only dominant firms with a deep pocket can afford this type of cross-subsidization between different groups of clients on any substantial scale. Only such firms have the market power to ensure that their targeted attack prices will not degenerate into unsustainable market prices *erga omnes*, mainly because most of the regular clients will have nowhere else to go, and must pay the situation rent most dominant firms are able to charge. Furthermore, if dominant firms were to be free to use attack or retaliation prices of this kind, no small competitor would ever dare to challenge the dominant firms of his market. The useful effect of Article 86 would have been seriously undermined. The Court clearly saw this, and qualified as abusive prices below or close to average variable costs, because these were capable of eliminating from the market firms which do not have the resources to resist this kind of competition, and which may be just as efficient as the dominant enterprise.¹⁰⁶

104. For more detailed comments on *Hag II*, see René Joliet, *Markenrecht und Freier Warenverkehr: Abkehr von HAG I*, 1991 GRUR INT'L 177; Peter Oliver, *Of Split TradeMarks and Common Markets*, 1991 MOD. L. REV. 587; see also Bastiaan van der Esch, *Note de Commentaire*, 1991 C. DE D. EUR. 473.

105. Case C-62/86 (Eur. Ct. J. July 3, 1991) (not yet reported).

106. *Id.* slip op. ¶¶ 71-72.

This firmness of the Court on substance is matched by balance on the level of fairness. First among the elements justifying a reduction of the fine is the argument that Community law on abusively low prices had not been previously defined.¹⁰⁷

3. Dutch Media Legislation Cases

The objective of the Dutch media legislation cases, *Commission v. Netherlands*¹⁰⁸ and *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*,¹⁰⁹ is to ensure cultural pluralism and the non-profit character of broadcasting in the Netherlands. For that purpose, the authorized broadcasting corporations must do a large part of their recording with equipment, studios and personnel belonging to a single company. Similarly, the supply of televised publicity is channelled through a single enterprise. The re-transmission by cable companies of publicity in Dutch contained in programmes broadcast from other Member States is only allowed on the condition that the publicity is inserted in the programmes according to the Dutch model. Market reservations of this kind obviously hinder other Community operators supplying the services in question and distort competition in the relevant markets. Private operators challenged this practice through a reference under Article 177, as did the Commission under Article 169.

The Court used its rulings to provide an elaborate restatement of applicable Community law. Measures which discriminate on grounds of nationality may, exceptionally, be justified on express Treaty grounds such as those contained in Article 56.¹¹⁰ However, restrictions on intra-Community trade in goods or services and distortions of competition may also result from measures applying without distinction to national and other Community operators. Article 59 also prohibits such measures, unless they are justified by mandatory requirements of general interests recognized in Community law, and provided they are proportional to the objective pursued.¹¹¹

107. *Id.* ¶ 163.

108. Case C-353/89 (Eur. Ct. J. July 25, 1991) (not yet reported).

109. Case C-288/89 (Eur. Ct. J. July 25, 1991) (not yet reported).

110. EEC Treaty, *supra* note 3, art. 56.

111. *Netherlands*, slip op. ¶¶ 14-17, 34-35. Paragraph 18 contains an interesting list of the mandatory requirements that have been recognized thus far. Paragraph 35

Non-discrimination is not the only test of compatibility of national measures with the Treaty; the standard of a justified objective and proportionality standard must also be met.¹¹² Measured against this standard, the arguments of cultural policy advanced by the Dutch government are weighed and rejected. Cultural pluralism does not depend on the privileged position of a national supplier of the services concerned.¹¹³

In each case, the Court's reasoning is solidly based not on discrimination by nationality but on an unjustified distortion of competition. The comprehensiveness of the objective of undistorted competition in a single market is clearly demonstrated.

CONCLUSION

Recent judgments in competition cases confirm that a correct interpretation of the EEC competition rules, including Article 90 of the Treaty, requires the recognition that these provisions are part of the wider legal order of the Community, and necessarily share in the concern for comprehensiveness and coherence that permeates the Court's other case law.

Particularly with respect to the application of Article 90, a more specific conclusion can be drawn. The Commission should seize more firmly the opportunity offered by the Court in its *Telecom* and Dutch media legislation judgments, and henceforth assess all state measures as defined in Article 90(1) and (2)—including the creation of legal monopolies—as just another category of national economic or industrial policy measures. The standards for this assessment should be the same as for all other such measures, that is, (1) no discrimination on grounds of nationality, and (2) evidence of a justified objective and of proportionality with that objective. This approach enhances the clarity of Community law on the subject and promotes legal certainty better than the somewhat

echoes paragraph 12 of *Telecom*, Case C-202/88 (Eur. Ct. J. Mar. 19, 1991) (not yet reported), with the statement that in order to know whether a Member State *may* remove a given activity from the field of competition it must be decided whether the restrictions that would be created in that manner can be justified by the reasons of general interests stated in paragraphs 17 and 18 of the judgment.

112. See *supra* notes 27-29 and accompanying text.

113. *Commission v. Netherlands*, Case C-353/89, slip op. ¶¶ 31, 47 (Eur. Ct. J. July 25, 1991) (not yet reported); see *Stichting*, slip op. ¶¶ 24-30.

strained efforts to find discrimination under Articles 30, 37, or 56, or the attempt to control the exercise of retained powers by means of a detour under Article 86.

POST SCRIPTUM

After the manuscript of this Article was completed, the Court of Justice handed down its judgment in *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*.¹¹⁴ As was to be expected, the Court found the crude protectionism in favor of Italian goods and workers resulting from the exclusive rights at issue contrary to Article 90, in conjunction with Articles 30 and 48. It also laid at the doorstep of the Italian State the abuses of a dominant position committed by the grantees of these rights, and found them contrary to Article 90(1) in conjunction with Article 86. Following the *Höfner*¹¹⁵ and *ERT*¹¹⁶ cases, the Court reaffirmed that Member States can no longer grant exclusive rights or create "situations" that "cause" the grantees to commit abuses within the meaning of Article 86.¹¹⁷

The Court's use of the verb "*amener à*," that is, to bring about or to cause, indicates that the Court is thinking of a flexible link between the modalities of a grant of exclusive rights, including the context created by several interconnected grants, and abusive conduct or the risk thereof. The latter point also emerges from the Court's judgment in *Régie des Télégraphes et des Téléphones v. SA "GB-Inno-BM."*¹¹⁸ Following its *Telecom* judgment,¹¹⁹ the Court confirmed that Member States do not have the right to extend, without objective necessity, legitimate general service monopolies into adjacent markets that are not of general economic interest. Doing so, it concluded, violates Article 90(1) in conjunction with Article 86. Furthermore, the court found it contrary to the equality of opportunities inher-

114. Case C-179/90 (Eur. Ct. J. Dec. 10, 1991) (not yet reported); see *supra* note 94 (discussing *Merci Convenzionali Porto*).

115. *Höfner and Elser v. Macrotron, GmbH*, Case C-41/90 (Eur. Ct. J. Apr. 23, 1991) (not yet reported); see *supra* notes 75-77 and accompanying text (discussing *Höfner*).

116. Case C-260/89 (Eur. Ct. J. June 18, 1991) (not yet reported).

117. *Merci Convenzionali Porto*, slip op. ¶ 17.

118. Case C-18/88 (Eur. Ct. J. Dec. 13, 1991) (not yet reported).

119. Case C-202/88 (Eur. Ct. J. Mar. 19, 1991) (not yet reported); see *supra* notes 66-68 and accompanying text (discussing *Telecom*).

ent in the system of undistorted competition under Article 3(f) to give a monopolist discretionary regulatory authority over its competitors.¹²⁰ Apart from other interesting features, these judgments once more confirm the loss of sovereignty inherent in the Treaty, which prevents Member States from exercising their retained powers in a manner that *unilaterally* protects economic activities carried out within their borders.

120. In different language, the same result was reached in *Italy v. Commission*, Case 41/83, [1985] E.C.R. 873, 884-86, [1985] 2 C.M.L.R. 368, 378-80.